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Nos. 71-720, 71-759 and 71-760

In the Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
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JOHN PHILIP CERONE, SR. AND JAMES CERONE,
PETITIONERS

v.

UNITED STATES OF AMERICA

DONALD J. ANGELINI, PETITIONER

v.

UNITED STATES OF AMERICA

DOMINIC CORTINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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JOHN PHILIP CERONE, SR. AND JAMES CERONE,
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After a jury trial in the United States District Court for the Northern District of Illinois, petition-

455-751—72——1

ers and a co-defendant, Ferriola,[1] were convicted of having conspired to violate 18 U.S.C. 1952 with respect to illegal gambling. Petitioner Angelini was also convicted of one substantive violation of 18 U.S.C. 1952. They were each sentenced to five years' imprisonment and fined $10,000 on the conspiracy count (the fine was suspended with respect to petitioner Cortina); petitioner Angelini was also sentenced to five years' imprisonment and a $10,000 fine on the substantive count, both to be concurrent with his sentence under the conspiracy count. The court of appeals affirmed in a comprehensive opinion (Pet. App. A).[2]

The government's case against petitioners was based primarily on the testimony of a government informer, Louis Bombacino. The evidence, which is summarized in the opinion below (Pet. App. A2–11), showed essentially that Bombacino had worked as a bookmaker in a gambling syndicate in which petitioners were part of the hierarchy. Under the direction of petitioners, Bombacino accepted bets on sporting events by telephone, including some interstate calls. Bombacino identified each of the petitioners and indicated their knowledge and direction of the conspiracy by relating various meetings involving each of them.

1. All of the petitioners contend[3] that the co-conspirator exception to the hearsay rule constitutes a

[1] Ferriola has filed a motion in this Court seeking an extension of time within which to file his petition for certiorari. The case of another co-defendant, Aureli, was severed during trial.

[2] Pet. App. refers to the appendix in the petition of John and James Cerone.

[3] Cerone Pet., Point 1, Cortina Pet., Point 1, and Angelini Pet., Point 8.

denial of their rights of confrontation under the Sixth Amendment. In addition to the arguments advanced below and rejected by the court of appeals (Pet. App. A 11–16), petitioners here claim that the dismissal of the writ of certiorari in *Bostic* v. *United States,* 402 U.S. 547, indicates that the hearsay exception for statements of co-conspirators is no longer valid. This is incorrect. The Court's statement of its reasons for dismissal of the writ in *Bostic* shows that, in granting certiorari, the Court had erroneously assumed that the case presented an issue as to whether a person who had been removed from the conspiracy by his arrest could be held responsible for substantive crimes later committed by co-conspirators, which had not been within the contemplation of the conspiracy at the time of arrest. The dismissal of the writ had nothing whatsoever to do with the evidentiary rules relating to co-conspirator statements. As pointed out by the court below (Pet. App. A 13–14), the decision in *Dutton* v. *Evans,* 400 U.S. 74, upholding the right of the states to adopt a co-conspirator rule broader than that of the federal courts, recognized that the traditional co-conspirator exception to the hearsay rule did not violate a defendant's right of confrontation.

2. Petitioners John and James Cerone also contend that their conspiracy convictions should be reversed because there was no direct proof that they had knowledge of the interstate aspects of the conspiracy (Cerone Pet., Point 3). They claim that the government conceded below that they had no such knowledge (Cerone Pet. 21). This is incorrect. The full

sentence from the government's brief (p. 62), which petitioners only partially quoted makes clear that the government's "concession" was on an *arguendo* basis:

> Even if we were to agree that some of the defendants had no knowledge of the conspiracy's interstate activities, it does not follow that the evidence is insufficient to sustain the verdict on Count I.

The government's *arguendo* position below was that a particular conspirator need not have knowledge of the interstate aspect of the activities for his conviction of conspiracy to violate 18 U.S.C. 1952 to be valid. *United States* v. *Roselli*, 432 F. 2d 879, 891–892, (C.A. 9), certiorari denied, 401 U.S. 924; *United States* v. *Hanon*, 428 F. 2d 101, 108 (C.A. 8), certiorari denied, 402 U.S. 952. It is, however, unnecessary to rely upon this proposition here. The trial court charged the jury that knowledge that interstate telephone lines or mails would be used as part of the conspiracy was a necessary element of the offense with respect to each defendant (Tr. 2161). The jury thus necessarily found that the Cerones had such knowledge and the court below properly concluded that there was "ample evidence" to support this finding (Pet. App. A 17–18).

3. Petitioner Cortina contends that the trial court erred in allowing the government informer, Bombacino, to testify that he had contacted the F.B.I. after certain meetings (Cortina Pet., Point 2). Cortina claims that evidence of these contacts raised an in-

ference that Bombacino made reports at those times, which would constitute inadmissible, prior consistent statements. Since there was no testimony as to what, if anything, was said in these contacts, there was clearly no error in permitting the testimony.'

4. Petitioners' other contentions were fully answered in the opinion of the court of appeals on which we rely.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1972.

'The court of appeals found it unnecessary to comment on this allegation of error.

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